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April 1, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: November 2, 2004

Case Number: TSO-0165

This Decision considers the eligibility of XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

The individual is an employee of a Department of Energy (DOE) contractor, and was granted a DOE access authorization in 1981. In July 2001, the individual submitted an Incident Report to the DOE indicating that three days earlier he had been arrested for driving while intoxicated (DWI). In early March 2003, the individual submitted another Incident Report indicating that he had been arrested for DWI and Possession of Marijuana at 12:30 a.m. on Sunday, March 2, 2003. After these arrests, the DOE conducted two Personnel Security Interviews with the individual. In addition, the individual was evaluated in July 2003 by a DOE-consultant psychiatrist (the DOE-consultant psychiatrist), who issued a report containing his conclusions and observations).

In June 2004, the Manager for Personnel Security of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual. In this letter, the Manager states that the individual's behavior has raised security concerns under Sections 710.8(h), 710.8(j), 710.8(k) and 710.8(l) of the regulations governing eligibility for access to classified material. Specifically, with respect to Criteria (h) and (j), the

Operations Office finds that the DOE-consultant psychiatrist concluded that the individual has been a user of alcohol habitually to excess and that he suffers from Alcohol Abuse with no evidence of rehabilitation or reformation. It also refers to his July 2001 arrest for DWI with a breathalyzer reading of .16 and his March 2003 arrest for DWI with a breathalyzer reading of .141.

With respect to Criterion (k), the Notification Letter states that during an April 2003 Personnel Security Interview (PSI), the individual admitted to being in possession of marijuana when he was arrested in March 2003 for DWI. It also refers to the individual's admissions in a 1981 PSI that he used illegal drugs in high school and college, and had last used marijuana on December 31, 1980.

With respect to Criterion (l), the Notification Letter states that the individual's possession of marijuana at the time of his March 2003 DWI arrest appears to violate Drug Certification that he signed with the DOE in 1981. This Drug Certification stated that he would not be involved with any illegal drugs in the future. The Notification Letter also refers to the individual's arrest for DWI and possession of marijuana in March 2003 and his arrest for DWI in July 2001. It notes that the March 2003 arrest violated the unsupervised probation ordered by the court for his July 2001 DWI.

The individual requested a hearing (hereinafter "the Hearing") to respond to the concerns raised in the Notification Letter. In his initial response to those concerns, the individual asserted that he had maintained complete sobriety since his March 2, 2003 DWI arrest, and that he has attended stress counseling and will document regular attendance at Alcoholics Anonymous meetings. He also stated that he was committed to remaining one hundred percent alcohol free for the remainder of his life. Individual's July 20, 2004 Response to Notification Letter (Individual's Response) at 1.

With respect to his possession of marijuana, the individual offered an explanation of how the marijuana was found on his person by the police at the time of his March 2003 arrest. He asserted that his college age daughter and several of her friends had used his vehicle the night before his arrest. The following morning, he discovered a small piece of marijuana inside a cigarette wrapper stuffed in the passenger seat of his vehicle. He stated that he placed the marijuana in the inside pocket of his jacket with the intention of confronting his daughter about it. That night, before he could confront his daughter, he was arrested for DWI and the marijuana was discovered by the police when they emptied his jacket contents. He asserted that two days after his arrest, he voluntarily had his blood screened for marijuana in order to prove

that he does not use marijuana. The results of this drug screen were negative for marijuana. He also asserted that he has been randomly tested for marijuana by his employer "a number of times over the life of the program" and that all of these tests were negative. Finally, he stated that beginning in December 2003, he voluntarily has submitted to toxicology screens on approximately 30 day intervals in order to further substantiate his assertion that he does not use marijuana or any illegal drug. Individual's Response at 2-3.

The requested hearing in this matter was convened in January 2005 (hereinafter the "Hearing"). At the Hearing, the individual and his counsel did not contest the DOE-consultant psychiatrist's diagnosis of alcohol abuse. Accordingly, I find that the individual suffers from alcohol abuse subject to Criterion (h) and (j). The testimony at the Hearing focused chiefly on the individual's sobriety and rehabilitation activities since March 2, 2003, and the individual's efforts to mitigate concerns raised by his possession of a small amount of marijuana at the time of his March 2, 2003 arrest.

II. HEARING TESTIMONY

At the Hearing, testimony was received from eight persons. The DOE presented the testimony of a DOE Security Specialist and the DOE-consultant psychiatrist. ^{1/} The individual, who was represented by counsel, testified and presented the testimony of his wife, his brother-in-law, a longtime friend, his immediate supervisor, the attorney who represented him following his March 2003 arrest, and a friend who attends Alcoholics Anonymous (AA) meetings with him. Following the Hearing, the individual's daughter submitted a sworn statement concerning the marijuana found on the individual's person at the time of his March 2003 arrest.

A. The DOE Security Specialist

The DOE Security Specialist explained that the individual's admission that he was in possession of a small amount of marijuana at the time of his March 2003 DWI arrest raised a criterion (k) concern even where there is evidence, such as a negative drug test, that he had not consumed marijuana. She testified that individuals holding access authorization should have no involvement with

^{1/} As indicated by the testimony of the DOE-consultant psychiatrist (TR at 36), he clearly qualifies as an expert witness in the area of addiction psychiatry.

illegal drugs, and that included possession of such drugs. Although she acknowledged that the DOE drug certification that the individual had signed in 1981 referred to the "use" of illegal drugs, she believed that his mere possession of the marijuana violated his drug certification. She explained that DOE policy "is not to be involved in illegal drugs at all" and that the individual had periodically signed a security acknowledgment which indicated his awareness that any "involvement" with illegal drugs could result in the loss of his access authorization. Hearing Transcript (TR) at 13-16.

With regard to the individual's explanation that he was carrying the marijuana in his jacket with the intention of confronting his college age daughter about it, the Security Specialist stated that his explanation could mitigate the DOE's concern to some extent. However, she testified that the individual should have told the authorities about the marijuana when he was arrested. The fact that he was intoxicated and had forgotten about the marijuana in his possession at the time of his arrest raised a concern for the DOE about his judgment. TR at 17-18. Under questioning by the individual's counsel, the DOE Security Specialist reiterated her concern that the individual exhibited poor judgment in keeping the marijuana in his possession while consuming alcohol and driving under the influence. She believed that he should have destroyed it immediately or at least stored it safely in his home until he could confront his daughter. TR at 32-34. However, she agreed that if the individual demonstrated reformation from alcohol abuse and thereby convinced the DOE that he would not drink and drive and handle illegal drugs in the way that he did in March 2003, the DOE's concern about his judgment regarding the marijuana could be mitigated. TR at 35.

B. The DOE-consultant Psychiatrist

The DOE-consultant psychiatrist testified that in July 2003 he evaluated the individual for alcohol problems and the possible use of illegal drugs. Based on all of the information that he collected and reviewed, the DOE-consultant psychiatrist concluded that the individual suffered from alcohol abuse.

[The individual] certainly was open in saying that he began drinking as a teen, and that through high school, college and after, that his alcohol intake increased. I think what's relevant is what the implications are with regard to one's use of alcohol, and that is receiving two DWIs. Studies have been done and published concerning the probability of alcohol being a problem with two DWIs.

The two DWIs occurred, I believe, within 24 months of each other. And the data indicate that for a male the chances of having a life long alcohol dependency or alcohol abuse diagnosis is about 75 percent. Further, [the individual] said that . . . he was under stress, and that he would buy a fifth of bourbon and two or three 12-packs of beer on a weekly basis. He said that he would drink to intoxication at least once a week. With the DUIs and the admission of driving after drinking, I felt that he met criteria for alcohol abuse. . . .

TR at 39-40.

With regard to rehabilitation and reformation from alcohol abuse, the DOE-consultant psychiatrist testified that in his July 2003 Report to the DOE, he wrote that the individual could demonstrate rehabilitation from his condition of alcohol abuse by attending AA for a minimum of 50 hours with a sponsor (at least twice a week for a minimum of six months), and by maintaining sobriety for a full year. As an alternative to AA attendance, the DOE-consultant psychiatrist stated that the individual could attend a therapy group that focused on alcohol abuse. He also stated that any resumption of alcohol consumption by the individual indicated that he was not showing adequate evidence of rehabilitation. TR at 42-43. He also testified that if the individual did not attend AA or a therapy group, he would need to complete two years of sobriety in order to demonstrate rehabilitation. TR at 43.

The DOE-consultant psychiatrist testified that at the time that he examined the individual in July 2003, he concluded that the individual was at a high risk for relapse.

I was afraid for his welfare, . . . that he would continue to drink. Because he has, at that time, a long pattern of excessive alcohol use, and did not appear to me at that time to be entirely aware of the dangers of his alcohol intake.

TR at 44.

With respect to the individual's possible use of illegal drugs, the DOE-consultant psychiatrist testified that the fact that the individual tested negative for marijuana immediately after his March 2003 arrest convinced him that the individual was not a user of marijuana.

I think the overwhelming evidence in this situation is that the drug screen was negative. And what's critical here is the half-life of marijuana. It's very long, it's fat soluble, and it stays in the body a long time. And the assays we have today can pick up marijuana used months before. So this, to me, indicates that there was no use of marijuana. Further, those that work at the DOE facility here, I believe are randomly tested. And certainly if any of these had tested positive there would have been repercussions.

TR at 49. The DOE-consultant psychiatrist then stated that the negative drug test "lends credence" to the individual's explanation of why he was in possession of a small amount of marijuana at the time of his March 2003 arrest. The DOE-consultant psychiatrist concluded that the individual's possible use of marijuana is really not an issue or concern for the DOE "unless they want to make something of his daughter using it." TR at 49.

The DOE-consultant psychiatrist also testified that he administered several batteries of psychological tests to the individual during their July 2003 meeting. He stated that the individual answered the questions on these tests in a reasonably forthright manner, and did not attempt to present an unrealistic or inaccurate impression that was either more negative or more positive than was reality. The DOE-consultant psychiatrist noted, however, that at the time of the July 2003 examination, the individual was convinced that alcohol was no longer a problem for him, whereas the DOE-consultant psychiatrist believed that at that time he still had "a high potential" for future alcohol problems. TR at 51.

When questioned by the individual's counsel, the DOE-consultant psychiatrist stated that at their July 2003 meeting, the individual told him that he had already attended about six AA meetings. TR at 54-55.

C. The DOE-consultant psychiatrist's Additional Testimony

Following the testimony of the other witnesses, the DOE-consultant psychiatrist was asked to evaluate what he had heard concerning the individual's efforts at maintaining his sobriety in recent months. The DOE-consultant psychiatrist stated that the individual had demonstrated both rehabilitation and reformation from his diagnosis of alcohol abuse.

I think that he's in full remission, and I'm more than convinced that he has one of the best chances of anyone

that I've spoken to, a very good support system. And I commend [the individual] highly for abstaining, and I wish [him] the best continuing to do so. And so I do not think that [the individual is] at risk.

TR at 161-162. The DOE-consultant psychiatrist also indicated that he accepted the explanation of the individual for having been in possession of a small amount of marijuana at the time of his March 2003 arrest. He testified that the circumstances of this possession would not cause him to believe that the individual is unreliable and untrustworthy, and that the possession of marijuana should not be an issue of concern for the DOE in this instance. TR at 163.

D. *The Individual*

The individual stated that he agreed with the DOE-consultant psychiatrist's diagnosis of alcohol abuse and that the best way to deal with his alcohol problem is to never drink again. TR at 140. He also stated that he agreed with the DOE-consultant psychiatrist that at the time of their July 2003 interview, he did not fully understand the extent of his alcohol problem.

I would have to agree with the doctor that I had only been sober for four months when I saw him, and he was right, I probably didn't give it the weight at the time that I have come to appreciate now.

TR at 140. He testified that the March 2003 DWI finally got his attention and convinced him to give up alcohol.

Well, the first [DWI] I thought was kind of a fluke, and I didn't really admit that I had a drinking problem. The second one, when I saw the flashing light in the rearview mirror, I knew at that point that I would never drink again on March 3rd, or 2nd. And, you know, the first step is to admit you've got a problem, well, I've certainly done that. And I'm working my way through all the steps and back again. So, I don't know what else to do other than state that I'm totally committed to abstinence and whatever it takes to make that happen.

TR at 140-141. He stated that his drinking had increased in the 2001 to 2003 time frame due to increased stress about the health of family members and a transfer at work "to probably the most stressful job in the whole plant." TR at 152. Since he stopped

drinking in March 2003, he gradually became more and more committed to AA as a means of coping with stress without alcohol.

It's a great program. It's a great way to live. Even if you're not a drinker, it's a great way to live. I'm pretty much committed to AA now. I'll keep going to AA. No matter how this [security clearance matter] plays out, I'm not going to drink anymore, and I'm still going to AA.

TR at 153. He said he first attended AA with a friend in April 2003, but did not attend AA regularly at that time. He stated that he has been attending weekly AA meetings "more or less regularly" for about one year. He testified that he only became aware of a need to document his attendance at AA meetings after he received a copy of the DOE-consultant psychiatrist's report in about July 2004, and read that he should document attendance at fifty AA meetings and have a sponsor. TR at 154-155. The individual stated that he considered his longtime friend who testified at the Hearing to be his AA sponsor although this friend does not attend AA meetings with the individual and technically cannot serve as the individual's sponsor under the AA program. He said that his other friend, with whom he attends AA meetings,

would be my sponsor or could be considered my sponsor today. I could call him right now, he would be happy to talk to me anytime. But [my longtime friend] is actually my sponsor. That's why he's here today.

TR at 155-156. He stated that he frequently has telephone conversations with his longtime friend to discuss family issues and relate those issues to the spiritual aspects of AA. TR at 156.

With respect to the marijuana issue, the individual testified that when the marijuana was discovered by the police during his March 2003 DWI arrest, he provided the same explanation to the police officers that he provided at the 2003 PSI and in his response to the Notification Letter. He stated that the police officers "just kind of shrugged their shoulders, like it doesn't make any difference what you say," and did not include his explanation in their police report. TR at 160.

He stated that on the advice of both his attorney and his supervisor, he got tested for marijuana use two days after his March 2003 DWI arrest, and that this test was negative for marijuana. TR at 143, Individual's Hearing Exhibit 4. Since the time his security clearance was suspended in December 2003, the

individual began having himself tested for marijuana consumption on approximately a monthly basis. He has submitted to a total of thirteen tests during this period, all of which have been negative for marijuana. TR at 145-146, Individual's Hearing Exhibit 5. He also has submitted documentation from his employer indicating that he has been randomly tested for illegal drugs nine times between June 1990 and July 2004, and that all of these tests were negative. Individual's Hearing Exhibit 3.

At the Hearing, the individual repeated the explanation for his possession of marijuana that he provided to the DOE at his April 2003 PSI and in his response to the Notification Letter, *i.e.*, that he discovered the marijuana in his van on the morning of his March 2003 DWI arrest and was holding it to confront his daughter. TR at 146-151. He stated that at the time of the arrest, he had forgotten that he had placed the marijuana in the pocket of his jacket earlier in the day. TR at 150. He also testified that he has not used any illegal drugs since he received his Q clearance from the DOE in May 1980. TR at 141.

E. The Individual's Wife

The individual's wife testified that they have been married for twenty-three years, and that during that time she has never known him to use illegal drugs, or to be involved in drug possession or trafficking. TR at 118. She stated that she also has not used or possessed illegal drugs during their married life, and that her use of alcohol is mainly limited to Thanksgiving and Christmas. TR at 119.

With regard to the individual's marijuana possession, the individual's wife stated that on Friday, March 1, 2003, she and the individual permitted their college-aged daughter to borrow the individual's van to drive some friends to a concert. She testified among these friends was a boy that her daughter was dating at that time. The individual's wife stated that she disliked him because he "smokes dope all the time and drinks all the time." She stated that at about 10:00 a.m. the next morning, the individual showed her a small amount of marijuana which he told her he had just found in the van. After they both expressed anger about the discovery, she told the individual to "get that stuff out of my house" and observed the individual put the plastic packet containing the marijuana back in his jacket. In the early afternoon, while her husband was out, the individual's wife stated that their college-aged daughter returned to the house, and that she and her daughter argued about the marijuana. She stated that her daughter then

packed up and went back to college, without seeing or speaking to the individual. TR at 120-123.

The individual's wife testified that her husband's second DWI in March 2003 was not "unexpected" because she had observed her husband increase his drinking in 2002 and 2003. She believes that this was the result of stress over their daughter's health, and other issues. TR at 127-129. She stated that about eight years ago they moved all of the alcohol from the house to the garage so that they could certify to the local school that their house was a safe place for teenagers to visit. She stated that her husband used to sit in the garage and drink, but that he did not go to bars. TR at 130.

The individual's wife testified that she has never seen her husband drink alcohol since his March 2003 DWI, and that she is certain that he has maintained his sobriety.

Well, he's with me all the time now. There is no alcohol in my garage. There is no alcohol in my house. He does not go to bars. He never did that. . . . I can tell if he's drinking. Will I smell his breath? Yeah.

TR at 131. She stated that she believes that her husband will not drink alcohol in the future.

He figured out he was an alcoholic. He wasn't a social drinker, he was an alcoholic, and alcoholics cannot drink.

TR at 133. She said that the individual currently attends AA meetings regularly on Monday evenings and probably will continue to do so for years. TR at 134-135. She said that the individual lost his driver's license for one year after his March 2003 DWI, and that during that period she or their college aged daughter or other AA participants would drive him to meetings. TR at 138

Under questioning by the DOE counsel she clarified that there is no alcohol in their home except at Thanksgiving and Christmas, when she buys wine and liquor for making Irish coffee. TR at 137.

F. The Individual's Brother-in-law

The individual's brother-in-law testified that he is married to the sister of the individual's wife and has known the individual for about twenty years. He stated that he and his wife socialize with the individual and his wife "every couple of weekends or so, and on

all family holidays." TR at 63. He further testified that he is a retired narcotics officer and corrections director who now runs a construction-related business. He stated that since the individual's March 2003 DWI, the individual has worked for him on weekends "certainly not necessarily for the money, but to occupy his time and be involved in something." *Id.* He stated that the individual socializes with him and the other workers at the end of the day, but that he always drinks a nonalcoholic beverage such as root beer. TR at 64. He stated that at no time since March 2003 has he seen the individual consume alcohol. He also affirmed that he has not seen the individual use or possess any illegal drugs, and would not associate with him if he did. *Id.* Speaking from his professional experience, he endorsed the individual's recovery efforts.

I think he's sincere about not using alcohol. I've been around the system long enough to know when someone is pulling the wool over my eyes, you know, and I think [the individual] is serious, and I hope he can continue to be so for his sake.

TR at 70.

G. The Individual's Longtime Friend

The individual's longtime friend stated that he has known the individual since they were in junior high school together, and that they have maintained contact over the years pretty consistently. Currently, he talks with the individual "pretty much every week" and once or twice a month they get together for lunch or dinner. TR at 72. The longtime friend stated that he had problems with alcohol and drug abuse, and that he has now been drug free and alcohol free for over twenty years. He testified that he has known of the individual's attendance at AA since 2003 and has supported him in his efforts. He stated that he is not the individual's AA sponsor "at the place where he goes" because he attends AA at a different location and travels frequently. However, he stated that in their discussions he has "been able to pass on some of the challenges I've gone through and been a sounding board." He has not observed the individual consume alcohol since March 2003 and believes that the individual is developing a greater understanding of himself and a commitment to sobriety. TR 74-75.

The longtime friend testified that if the individual used drugs as a teenager or young adult, it was experimental.

I didn't run around with him using drugs, and when I got into my drug problem is when I was not really around him. So I wouldn't say he was a drug user, no.

TR at 79.

H. The Individual's Supervisor

The individual's supervisor stated that he and the individual were co-workers from 1992 until 1998, when he became the individual's supervisor. He stated that on the Monday following the individual's March 2, 2003 arrest, the individual reported to him that he had been arrested for DWI and possession of marijuana. At that time, the individual told him that he did not use marijuana and explained that he had found the marijuana in his van the morning after his daughter and her friends borrowed the vehicle. In the same conversation, the individual admitted to him that he thought he had developed a drinking problem. TR at 87. The individual's supervisor testified that he suggested to the individual that he be tested for marijuana immediately, and that the individual acted on his suggestion. TR at 88. He believes that the individual is open with him about these issues, and he believes that the individual has maintained his sobriety since March 2003. TR at 89.

[the individual] is very open with me. I think that's a mutual thing, me being his boss in this regard. He talks about his personal life. I'm obviously familiar with his professional life. I'm very interested in the fact that he's not drinking and that he's not a drug user. I believe both to be the case. Frankly, I applaud his efforts, everything from his participation at AA to the drug testing that he's subjected himself to, all on his own accord. He's done a heck of a job.

TR at 90. The individual's supervisor also stated that he does not socialize outside the workplace with any of his employees, including the individual. TR at 92-93.

I. The Individual's Counsel for his 2003 Arrest

The attorney who represented the individual following his 2003 arrest testified that the individual contacted him immediately after his March 2003 arrest for DWI and marijuana possession. When the individual explained to the attorney that he had found the marijuana in his van and had kept it to confront his daughter, the attorney counseled him to get an immediate drug test, and then used

the individual's explanation and his negative drug test to get the prosecutor to dismiss the possession of marijuana charge. TR at 96 and DOE Exhibit 22.

The attorney testified that the individual's possession of marijuana was a legal violation, but that the charge was dismissed because the individual had no intent to use or traffic in marijuana.

With respect to the alcohol related charges, the attorney testified that the original charges of DWI and a moving violation were amended to breath alcohol content of .10 or more (BAC). The individual was placed on supervised probation for two years and was requested to attend a class, which he successfully completed. The attorney filed a motion to terminate supervised probation which was granted by the court in August 2004. TR at 99-100.

J. The Individual's Friend from AA

The individual's friend from AA testified that he has attended AA for twenty three years, and that he knows the individual from the AA chapter that he currently attends. TR at 104. He could not remember when he first observed the individual attending a chapter meeting but stated that the individual's assertion of April 2003 was "probably pretty close to what I would recollect." TR at 105.

He stated that in August 2004, the individual began to document his attendance at the chapter meetings. TR at 112. He also verified that records documenting the individual's attendance at sixteen AA meetings between August 9, 2004 and January 24, 2005 were genuine. TR at 106-107 and Individual's Hearing Exhibit 2. He stated that he was not the individual's sponsor and had talked to the individual one-on-one on a regular basis. TR at 108. From his observation of the individual at AA meetings, he stated that he believed that the individual was sincerely participating in the meetings, and that he was making progress. TR at 108 and 110.

He seems quite calm, and seems to have his act together pretty well. . . . I think that when we first address the problem we all go through a period where we're a bit upset, and usually kind of angry with ourselves anyway, and things are not going well on the outside. So we all go through that period. And then hopefully you come out on the other end and you get on with things. And I would say that [the individual] has come out the other end, for my observations, from what I've seen of him, and seems to have put his life back together.

TR at 110-111. The individual's friend from AA also testified that he had not observed any behaviors or conduct on the part of the individual that suggested that he had started drinking again. TR at 108-109.

K. Post-hearing Declaration by the Individual's Daughter

The individual's college aged daughter did not testify at the Hearing, but following the Hearing she submitted a signed declaration which she declared to be true and correct under penalty of perjury pursuant to 28 U.S.C. Section 1746. In this declaration, she supported the individual's explanation of how he came to be in possession of marijuana at the time of his March 1, 2003 arrest. She stated that on the evening of Friday, February 28, 2003, she borrowed her father's van to drive herself, her boyfriend, and some other friends to a party in the Kansas City area.

During the evening my boyfriend was in possession of alcoholic beer and some marijuana which he kept inside the cellophane wrapper of a pack of cigarettes. I observed my boyfriend smoking marijuana inside the van at various times during the evening. After the party, I drove the van back to my parent's house and parked it in the garage in the early morning hours of Saturday, March 1, 2003. I did not clean out the van before I returned it.

March 15, 2005 declaration of the individual's daughter. She also confirmed that late the next morning, her mother told her that the individual had shown her marijuana and empty beer cans that he had found in the van. She also confirmed that she argued with her mother, quickly packed her belongings, and left her parents' house in order to avoid a confrontation with the individual. *Id.*

III. ANALYSIS

The individual contends that his twenty-two months of sobriety, his participation in AA, and his dedication to future abstinence from alcohol fully mitigate the Criteria (h) and (j) security concerns arising from his diagnosis of alcohol abuse and his alcohol related arrests in July 2001 and March 2003. He also contends that his explanation of how he came to be in possession of marijuana at the time of his March 2003 arrest, coupled with his negative drug tests and his rehabilitation from alcohol abuse, mitigates the Criteria (k) and (l) concerns identified in the Notification Letter. For the reasons stated below, I conclude that the individual's

arguments and supporting evidence on these issues resolve these security concerns.

A. *The Regulatory Standard*

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the Hearing Officer. As discussed below, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the Hearing Officer to base all findings relevant to this eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6) and 710.27(b),(c) and (d).

1. *The Individual's Burden of Proof*

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. The standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). *Personnel Security Review (Case No. VSA-0087)*, 26 DOE ¶ 83,001 (1996); *Personnel Security Hearing (Case No. VSO-0061)*, 25 DOE ¶ 82,791 (1996), *aff'd*, *Personnel Security Review (VSA-0061)*, 25 DOE ¶ 83,015 (1996). The individual therefore is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The regulations at Part 710 are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, by regulation and through our own case law, an individual is afforded the utmost latitude in the presentation of evidence which could mitigate security concerns.

Nevertheless, the evidentiary burden for the individual is not an easy one to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of

security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, we generally expect the individual in these cases to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the Hearing Officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995); *Personnel Security Hearing (Case No. VSO-0038)*, 25 DOE ¶ 82,769 (1995) (individual failed to meet his burden of coming forward with evidence to show that he was rehabilitated and reformed from alcohol dependence).

2. Basis for the Hearing Officer's Decision

In personnel security cases under Part 710, it is my role as the Hearing Officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

B. The Individual's Abstinence from Alcohol

In his September 2004 Statement and in his testimony at the Hearing, the individual contends that he has completely abstained from alcohol since March 2, 2003, a period of more than twenty-two months at the time of the Hearing. I find that the individual's testimony on this issue was credible and that he has adequately corroborated his assertion with the testimony under oath of a number of witnesses who spend significant time with the individual. The individual's wife has resided with the individual during this period. The individual's brother-in-law socializes with the individual and his wife frequently and works with the individual on weekends. The individual's longtime friend socializes with the

individual "once or twice a month" and has more frequent telephone contact with him. The individual's supervisor observes him in the workplace on a daily basis, and the individual's AA friend has attended chapter meetings with the individual since the Spring of 2003. All of these witnesses testified that they had not observed the individual consume alcohol since March 2, 2003, and believe that he is sincere in his determination to maintain his sobriety indefinitely.

C. Individual's Recovery Activities and Current Status

The testimony at the Hearing indicated that following the individual's March 2003 DWI, the individual resolved to stop consuming alcohol. The individual asserted that he began to attend AA meetings on an intermittent basis in April 2003. His counsel for his March 2003 DWI arrest testified that the individual successfully completed the probation requirements of his conviction for a BAC violation and that his supervised probation was terminated by the court in August 2004. The individual is now attending AA meetings on a regular basis and intends to continue to do so.

In the administrative review process, it is the Hearing Officer who has the responsibility for forming an opinion as to whether an individual with alcohol problems has exhibited rehabilitation or reformation. See 10 C.F.R. § 710.27. The DOE does not have a set policy on what constitutes rehabilitation and reformation from alcohol dependence, but instead makes a case-by-case determination based on the available evidence. Hearing Officers properly give a great deal of deference to the expert opinions of psychiatrists and other mental health professionals regarding rehabilitation and reformation. See, e.g., *Personnel Security Hearing* (Case No. VSO-0027), 25 DOE ¶ 82,764 (1995) (finding of rehabilitation); *Personnel Security Hearing* (Case No. VSO-0015), 25 DOE ¶ 82,760 (1995) (finding of no rehabilitation). At the Hearing, the DOE-consultant psychiatrist concluded that the individual's demonstrated abstinence over the last twenty-two months indicates that he is in full remission from the diagnosis of alcohol abuse, and that his commitment to continued sobriety, his AA attendance, and the changes that he has made in his style of living indicate both rehabilitation and reformation from alcohol abuse.

I agree with the DOE-consultant psychiatrist's conclusions. My positive assessment of the individual's demeanor and of the evidence presented at the Hearing convince me that the individual has maintained his sobriety since March 2, 2003, that he has committed himself to lifelong sobriety, and that he has shared that

commitment with his wife and his employer. In addition, the individual has demonstrated an ability to conduct his social and recreational activities without alcohol. These positive developments are all significant factors which indicate rehabilitation and reformation from the diagnosis of alcohol abuse. In light of these factors, I find that the individual has mitigated the DOE's Criteria (h) and (j) concerns.

D. Concerns Related to the Individual's Possession of Marijuana

I find that the individual has offered a consistent and credible explanation for how he came to be in possession of a small amount of marijuana at the time of his March 2003 DWI arrest. This explanation, if true, mitigates the DOE's concern that the individual was involved in using marijuana or in the trafficking of marijuana. The individual has offered sufficient corroborative evidence for me to accept his explanation as true and complete. The testimony of his wife concerning the individual's discovery of the marijuana in his van on the morning of March 1, 2003 was very convincing, as was the sworn statement of his daughter concerning her boyfriend's use of marijuana in that same vehicle the night before. The individual's 2003 attorney and the individual's supervisor affirmed that the individual provided the same explanation to them immediately after his arrest.

The individual's explanation is further supported by a negative blood screen for marijuana which he voluntarily undertook two days after his March 2, 2003 arrest. The individual's history of negative drug screens at his place of employment, and his voluntary monthly drug screens beginning in December 2003 further support his assertion that he is not a user of marijuana. The individual's brother-in-law and his longtime friend also asserted that the individual was not a marijuana user. Finally, the DOE-consultant psychiatrist stated that the individual's negative drug test following his March 2003 arrest convinced him that the individual was not a marijuana user and that his explanation was credible. For these reasons, I accept the individual's explanation that he discovered the marijuana in his van the morning of his arrest and was holding it for the purpose of confronting his daughter.

Even accepting the individual's explanation, there is still a security concern regarding his decision to carry the marijuana about with him on the day of his arrest rather than to destroy it immediately. I do not believe that the individual's behavior raises a concern that he will use or possess illegal drugs in the future. The testimony convinces me that the individual's possession of a small amount of marijuana on March 1, 2003 was a

minor slip in the individual's judgment which will not be repeated and does not rise to the level of a significant security concern. The prosecutor's decision to dismiss the individual's charge for marijuana possession indicates that the individual's actions in this regard were not viewed as a serious legal matter by the state government. I also conclude that the individual's lack of judgment concerning his continued possession of the marijuana on March 1, 2003 arose in part from a misuse of alcohol on that date which will not be repeated.

Under these circumstances, I find that the individual's rehabilitation and reformation from alcohol abuse mitigates the Criterion (l) concern arising from his 2001 and 2003 DWIs. Similarly, I find that his ongoing sobriety since March 2, 2003 and his abstinence since 1980 from any use of marijuana and other illegal substances mitigates the DOE's concerns that he will use marijuana or improperly possess and transport marijuana in the future. Accordingly, I find that the individual has mitigated the Criteria (k) and (l) concerns identified in the Notification Letter.

IV. CONCLUSION

For the reasons set forth above, I find that the Notification Letter's derogatory information under Criteria (h), (j), (k) and (l) has been mitigated by sufficient evidence of rehabilitation and reformation from alcohol abuse and by the individual's explanation for his possession of marijuana. Accordingly, after considering all the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I conclude that the individual has demonstrated that granting him access authorization would not endanger the common defense and would be clearly consistent with the national interest. It therefore is my conclusion that the individual's access authorization should be restored. The individual or the Manager may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: April 1, 2005

